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IN THE

Supreme Court of the United States

October Term, 1952

No. 623

L. B. BINION, alias BENNY BINION, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

Case No. 13,655, in United States Court of Appeals for Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case January 6, 1953. A motion for rehearing was denied January 26, 1953, but at the same time the Circuit Court granted a

motion to recall its mandate and allowed a period of 30 days from January 26, 1953, for filing this petition with the Supreme Court (R. 244).

OPINIONS BELOW

The opinions below in the United States District Court for the District of Nevada and in the Court of Appeals for the Ninth Circuit have not been reported. They are printed at pages 19 to 34 and 241 respectively of the Transcript of Record herein.

JURISDICTION

The judgment of the Court of Appeals was entered January 6, 1953 (R. 242), and the motion for rehearing was denied January 26, 1953 (R. 244). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a removal order issued pursuant to Rule 40 of the Federal Rules of Criminal Procedure which has the effect of subjecting Defendant to arrest and trial on long-pending state criminal charges for which his extradition has been refused by the courts of the asylum state, is a final and therefore an appealable order.

2. Whether Rule 40 of the Federal Rules of Criminal Procedure prevents a showing by the Defendant at a removal hearing that the indictment upon which removal is sought was an abuse of federal process in aid of state court jurisdiction.

3. Whether Rule 40 of the Federal Rules of Criminal Procedure, requiring that a judge, upon presentation of an indictment and identification of the accused, shall order his removal, is violative of Defendant's constitutional rights under Art. III, Sec. 2., Cl. 3 and the Fifth and Sixth Amendments of the Constitution of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent constitutional provisions (Art. III, Sec. 2., Cl. 3 and the Fifth and Sixth Amendments) and applicable statutes or portions thereof (Rule 40, Federal Rules of Criminal Procedure) are printed in the Appendix to this petition.

STATEMENT

This is an appeal from a judgment of the Court of Appeals for the Ninth Circuit which had the effect of affirming an order of removal signed by Judge Yankwich of the United States District Court for the District of Nevada on November 15, 1952, (R. 33-34). The Court of Appeals, on January 6, 1953, upon motion of the United States, dismissed a notice of appeal filed by Petitioner from the District Court's order of removal on the ground that a removal order is not an appealable order and that the appeal was "frivolous." (R. 241). A subsequent motion for rehearing was denied by the Court of Appeals on January 26, 1953, although the Court at the same time recalled its mandate to permit this appeal (R. 243-244).

At the removal hearing Defendant offered to prove the following facts:

L. B. Binion resided in Dallas, Texas for a number of years prior to late 1946. In the year 1946 he moved his business and his legal residence to Las Vegas, Nevada, where he is now engaged in the operation of a bar, restaurant and gambling casino known as "The Horseshoe Club". (R. 126-127)

Binion was indicted *in absentia* in 1949 while a resident of Nevada, for violation of state gambling laws in Texas. On two separate occasions the State of Texas requested the State of Nevada to extradite Binion to Texas to stand trial on this indictment, but on each occasion Nevada Courts refused extradition upon the grounds that Binion was not a fugitive from justice since he had established his resi-

dence in Nevada long before the indictment was returned; and on the further ground that gambling was not a crime cognizable under Nevada laws. (R. 127) (Eighth Judicial District Court in and for Clark County, State of Nevada, Case Nos. 1151, Feb. 2, 1950 and 1185, March 10, 1950).

Subsequent to the second refusal of the Nevada Courts to extradite, a Federal Grand Jury convened at Fort Worth, Texas, for the United States District Court for the Northern District of Texas, on May 2, 1952, returned an indictment against Binion charging him with violation of Section 145 (b) of the Internal Revenue Code, in that he was alleged to have filed a false income tax return with the Collector of Internal Revenue at Dallas, Texas, for the year 1949. Pursuant to Rule 20 of the Federal Rules of Criminal Procedure and with the consent of the United States District Attorney for the Northern District of Texas and the United States District Attorney for the Nevada District, the cause was transferred from the Northern District of Texas to the District of Nevada. (R. 129)

The consent of the two United States Attorneys and the written statement of the Defendant of willingness to enter a plea of guilty or *nolo contendere* were filed with the United States District Court for the District of Nevada on July 17, 1952. Thereafter, however, on August 5, 1952, each of the United States attorneys filed a written statement purporting to withdraw his consent to the transfer. At the same time the government filed a motion for an order directing the Clerk of the Nevada Federal Court to return the file to the Clerk of the United States District Court for the Northern District of Texas, Dallas, Texas. (R. 66-71). This change of mind by the United States attorneys resulted from instructions issued by the Attorney General (R. 151-152).

Hearing on the motion to retransfer venue to the United States District Court for the Northern District of Texas was held at Carson City, Nevada, on August 22, 1952, before United States District Judge Edward F. Murphy, and on that date the District Court entered its order denying the motion. (R. 66-71)

Defendant's plea of *nolo contendere* was accepted and on September 3, 1952, despite vigorous opposition of government attorneys which included their insistence that this defendant be sentenced to prison solely for the purpose of permitting the Texas State authorities to place a hold order upon him, the Court denied their arguments and imposed upon defendant a fine of $15,000.00, ordered him to pay the civil tax deficiency claimed by the government and placed him on probation for five years. (R. 79-108)

Texas State authorities, thwarted in their efforts to imprison Binion or to return him to Texas for trial on State charges, immediately sought and obtained a conference in Washington, D. C., with the Attorney General of the United States which was held on September 10, 1952. According to direct quotes in the Dallas newspapers, the Dallas County District Attorney announced before the Washington conference that its purpose was to find some federal means of getting Binion back to Texas (R. 128-135), and after the conference stated that the Attorney General had promised the Dallas County District Attorney to cooperate so that Binion could be submitted to State jurisdiction. (R. 132-135)

The Attorney General thereupon sent two special prosecutors to Texas to present to a second Federal Grand Jury a second Federal indictment for a year prior to the one on which Binion had already been indicted and sentenced. (R. 165)

On September 16, 1952, the Honorable T. Whitfield Davidson, Judge of the District Court of the United States for the Northern District of Texas, Dallas Division, impanelled a Grand Jury and charged that jury in part as follows:

> "There may be, in the course of time, one or two other matters that we will submit to you, and we may call you back; we may recess you and call you back to submit something special. I believe I will ask you not to go into any matter unless you and your District Attorney decide, in your room, that it should be gone

into, or unless it is a matter that has been submitted by the Court, because either the Court, or the Attorney General, or the Court on direction of the Attorney General, may have other matters that should be submitted to you to be gone into at a future time. And, I might say, in this connection that some time since you have read in the paper of a man by the name of Noble being blown to pieces at his mailbox. Not long before that you read where his wife was blown to pieces in his automobile, a bomb was placed under the hood. And not long before that you read where another man was killed; and, another man was killed; and, another man was killed.

"Killings of that type are often done by hired gangsters who are expert in the matter of covering their tracks.

"We have one of the most efficient county governments in all of Texas. We have one of the most efficient police forces in all of Texas. They come here in this courtroom and cooperate with this Court. We will want to cooperate with them.

"If the time comes, it may be that while the man, the hired assassin—they are killing off each other, they regard each other as crooked, they think the other one has betrayed him, or is about to do it, and they kill him, and they cover their tracks well. But, these hired gangsters, and the men that hire them, often are men, the handlers of money, they may cover their tracks when it comes to the killing, and yet leave them wide open when it comes to spending their money.

"On a case of that kind, delving into activities of men of that kind, under the heading of non-payment of income taxes, may reveal and open up an opportunity to punish men, as was done in the case of Al Capone." (R. 152-154)

On October 3, 1952 this Grand Jury returned a second indictment against Binion, charging him with violation of Section 145 (b) of the Internal Revenue Code for the year 1948. Pursuant to this indictment for the year 1948, the United States petitioned under Rule 40 of the Federal Rules of Criminal Procedure for a warrant of removal of the De-

fendant from the District of Nevada to the Northern District of Texas, Dallas Division, there to stand trial on the indictment.

Binion resisted removal, and as noted above, a removal hearing was held before the Honorable Leon R. Yankwich at Las Vegas, Nevada, on November 13 and 14, 1952. At the conclusion of the hearing, Judge Yankwich rendered a 14 page written opinion and signed a warrant and order for the removal of the Defendant to the Northern District of Texas. (R. 19, 33) He rejected the offer of proof made by the Defendant for the purpose of showing that the indictment was invalid, and held that Rule 40 deprived him of discretion to receive any evidence once existence of an indictment and the identity of the accused had been proved.

Petitioner promptly filed notice of appeal from the order of removal to the United States Court of Appeals for the Ninth Circuit. The United States on or about December 11, 1952, moved to dismiss the appeal, arguing that the order appealed from was not a final order. On January 6, 1953, the Court of Appeals for the Ninth Circuit granted the motion to dismiss the appeal, whereupon the United States District Court for the Northern District of Texas ordered the arraignment of the Defendant Binion at Dallas, Texas, on January 19, 1953. (R. 241)

Since petitioner had been informed that no mandate of the Court of Appeals would issue until January 23, 1953, he sought an order from Judge Yankwich to stay execution of the removal order and thus prevent his arraignment at Dallas on January 19—the day before inauguration of a new administration. Judge Yankwich granted the stay on January 16 and on January 23 petitioner, having by then learned that the mandate of the Court of Appeals had been issued on January 7, 1953, moved the Court of Appeals to recall its mandate and for rehearing. The Court of Appeals denied the motion for rehearing but recalled its mandate and granted petitioner thirty days from January 26 to perfect a petition for Writ of Certiorari to the Supreme Court. (R. 243)

Defendant had subpoened as witnesses to testify at the removal hearing the Attorney General of the United States, James P. McGranery, the Dallas County District Attorney, Henry Wade, and the then Chairman of the Dallas Crime Commission, Alphonso Ragland Jr. (R. 110, 126). He proposed to prove the facts set forth in his offer of proof through these witnesses and documentary material. Although the subpoenas were duly served in accordance with law, the Judge's rejection of the offer of proof prevented examination of the witnesses, two of whom did not honor the subpoenas. Defendant was also denied the right to cross-examine a Bureau of Internal Revenue agent (called by the government to identify the accused) with respect to the purposes of seeking a second income tax indictment against him. (R. 122, 124).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred in holding that:

1. A removal order issued pursuant to Rule 40 of the Federal Rules of Criminal Procedure, which order has the effect of subjecting the Defendant in the removal hearing to arrest and trial on a long-pending state criminal charge for which his extradition has been refused by the courts of the asylum state, is not a final and therefore an appealable order.

2. Rule 40 of the Federal Rules of Criminal Procedure prevents a showing by the Defendant at the removal hearing that the indictment upon which removal is based involved an abuse of federal process in aid of state court jurisdiction.

3. Rule 40 of the Federal Rules of Criminal Procedure, requiring that a judge, upon presentation of an indictment and identification of the accused, shall order his removal, does not violate accused's constitutional rights under Article III, Section 2, Clause 3, and under the Fifth and Sixth Amendments to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

Petitioner urges that a writ of certiorari should issue in this case under sub-division 5 of Rule 38 of this Court. The United States Court of Appeals for the Ninth Circuit has decided a question of general importance and of substance relating to the construction and application of the Constitution of the United States and a Federal Rule of Criminal Procedure, which has not been, but should be, settled by this Court. Its decision is not only in conflict with a recent decision of the United States Court of Appeals for the District of Columbia, *United States* v. *Cefaratti,* ——App. D. C. —, decided November 6, 1952, but it is also in conflict with applicable decisions of this Court in *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, (1949) and *Stack* v. *Boyle,* 342 U.S. 1. The courts below in this case have so far departed from accepted constitutional standards of due process and right to trial in the place where a crime shall have been committed as to call for the exercise of this court's power of supervision in the interest of the orderly administration of justice.

Essentially the Courts below have held that *no* removal order issued pursuant to Rule 40 of the Federal Rules of Criminal Procedure is appealable, regardless of the circumstances, and that a District Judge is effectively prohibited by the language of the Rule from hearing *any* evidence bearing upon the validity of the indictment regardless of whether the order is finally dispositive of claimed rights unrelated to the crime charged and regardless of whether the offered evidence would show a political conspiracy to persecute and oppress petitioner by the abuse of federal process as a subterfuge in aid of the illegal exercise of jurisdiction over the petitioner by the State of Texas. Petitioner asserts that the Rule requires no such rigid interpretation and that the Constitution of the United States forbids it.

1. A removal order which has the effect of submitting defendant to state jurisdiction for trial on a state indictment, as well as for trial on a federal indictment, is a final appealable order because it finally determines defendant's right to contest extradition by state of Texas authorities, a right twice before decided in his favor by the Courts of Nevada.

In the *Statement of Facts* herein we have pointed out that petitioner became a resident of Nevada in 1946 and that several years later, after indictment by the State of Texas for an alleged crime—gambling—committed in 1948, his extradition was twice requested by the State of Texas and twice denied by the courts of Nevada (R. 127) Once removed to Texas through the subterfuge of federal action, petitioner would become irrevocably subject to state court jurisdiction in connection with this earlier indictment.

Petitioner concedes that in the ordinary case, without complications, Federal courts have usually held that a removal order is interlocutory in nature and not subject to appeal. *Hemans* v. *Matthews,* 158 F. 2d 9; *Edelstein* v. *U. S.* 97 F. 2d 271, *cert. den.* 305 U. S. 617; *Wood* v. *Cooper,* 18 F. 2d 535, *cert. den.* 274 U. S. 750, *Fries* v. *U.S.* 284 Fed. 825; *Murray* v. *U. S.* 273 Fed. 522. But the element completely missing in the cited cases is dominantly present in this case: petitioner's right given him by the asylum state of Nevada to resist extradition to Texas for trial on a state indictment. Unless this Court intervenes, the removal order signed by Judge Yankwich on November 15, 1952 (R. 33) not only determines petitioner's availability for trial on Federal indictment in Dallas, Texas, but also irremediably subjects him to arrest and trial by Texas authorities. *Frisbie* v. *Collins,* 342 U. S. 519, 96 L. ed. 541 (1952)

Petitioner submits that such an order clearly falls into that "small class" of cases which this court has described as cases which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be de-

ferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp.* 337 U.S. 541, 545-547 (1949). In the *Cohen* case the question was whether an order entered in a pending suit denying a motion by defendant to require plaintiff to post an indemnity bond before proceeding with suit, was an appealable order. This Court held that Sections 1291 and 1292 of Title 28 of the U. S. Code governing the right of appeal were intended to limit appeals to only those questions which left the basic issue of a case "open, unfinished or inconclusive". An order denying a motion to require posting of an indemnity bond, the Supreme Court said, was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it".

The *Cohen* case has been cited by this Court with approval in the recent case of *Stack* v. *Boyle,* 342 U.S. 1, 6 (1951), where an order denying a motion to reduce bail was held to be appealable as a final decision.

Both the *Cohen* and *Stack* cases, *supra,* have been relied upon recently by the Court of Appeals for the District of Columbia Circuit as justifying review of a lower court order granting a motion to suppress evidence. *U. S.* v. *Cefaratti,* —— App. D. C. ——, November 6, 1952. There the Court of Appeals considered an order suppressing evidence as a "final decision under the statute governing appeals" and said that a "final order" need not be one which terminates an action if it has a "final and irreparable effect on the rights of the parties". Criteria for finality of an order mentioned by the Court were (1) whether the order has a "final and irreparable effect on the rights of the parties" which results in "a final disposition of a claimed right" (2) whether the question involved is "too important to be denied review"; and (3) whether the claimed right "is not an ingredient of the cause of action and does not require consideration with it".

Each of these criteria of finality is abundantly present in this case. Once within the territory of the State of Texas

petitioner may be arrested and tried by the state courts. If he is acquitted on the Federal charges he must still submit to the state trial. If convicted on the Federal charges he cannot raise the issue in that case of the State's jurisdiction over him. Yet the courts of Nevada have twice refused to order his extradition to Texas on the ground that he is not a fugitive from justice and the crime charged in Texas is not a cognizable crime under Navada law. Any construction of Rule 40 so broad as to permit final disposition of an unrelated right to resist extradition certainly raises a question "too important to be denied review". Finally, the Texas indictment is in no sense an ingredient of the Federal cause of action, which could be the subject of trial in any other State of the Union. Indeed, transfer of petitioner to Texas for trial after six years residence in another state would be oppressively expensive and unfair to petitioner, whose present home is more than a thousand miles from Dallas, Texas.

The only case cited in the *per curiam* opinion of the Court of Appeals for the Ninth Circuit to support its conclusion that the removal order in this case is not appealable was its own decision in *Meltzer* v. *U.S.*, 188 F. 2d. 916, a case readily distinguishable from the present one on its facts. In the *Meltzer* case, the defendant had *consented* to the issuance and signing of a warrant of removal and he appealed only from the portion of the order which fixed bail at $100,000.00, claiming that the bail was excessive. Even so, a cardinal point recognized by the Court in the *Meltzer* case but overlooked in this case is that the indictment must be "a *valid* indictment" and in this case petitioner directly attacks the validity of the indictment. Further, the element of abuse of Federal process in aid of state jurisdiction not otherwise obtainable, was completely absent in the *Meltzer* case. It is still doubtful that the *Meltzer* decision can be reconciled with the *Cefaratti* case, *supra:* or this Court's decisions in the *Cohen* and *Stack* cases, *supra.*

Petitioner submits that the order in this case was a final, appealable order and should be reviewed upon certiorari in order to eliminate conflict between Circuit courts and to provide an orderly pattern of jurisprudence to be followed in future removal cases.

2. An indictment obtained by abuse of federal process for the political purpose of aiding state authorities in their attempt to obtain jurisdiction over the petitioner, is a nullity and cannot be treated as probable cause sufficient to support a removal order within the meaning of Rule 40.

Fundamentally this question as presented below is whether an indictment so obtained is or can be a valid indictment. Attacks on indictments usually arise on motions to dismiss (formerly to quash). The majority rule in Federal courts and in most state jurisdictions is that a court will not inquire into the legality or sufficiency of the evidence upon which an indictment is based unless in exceptional cases where the ends of justice imperatively require it. *McGregor* v. *U.S.*, 134 Fed. 187, 69 C.C.A. 229. The primary reason for judicial reluctance to inquire into Grand Jury proceedings is the understandable desire of the law to protect the secrecy of such proceedings and to maintain the integrity of the grand jury system. See 31 A.L.R. 1479 for a thorough discussion of the majority and minority rules.

However, as in the case of most general rules of law, the courts have recognized many exceptions where the conscience of the court is aroused by a special set of facts and the inherent right and duty of the court "to protect citizens in their constitutional prerogatives and to prevent oppression or persecution" is invoked. *People* v. *Walsh* (1915), 92 Misc. 573, 156 N. Y. Supp. 366. Thus the Supreme Court of Alabama has said in *Sparrenberger* v. *State* (1875), 53 Ala. 481, 25 Am. Rep. 648, 2 Am. Crim. Rep. 470, that the court had inherent power to strike from its files an indictment whose only support before the Grand Jury was a former indictment:

> "The Court has an inherent power to strike from its files any paper which has been wrongfully, without the warrant of law, introduced into them; or to amend defects, or to expunge from its records matters not true or pertinent which may have been inadvertently, *or, if the facts should appear, fraudulently, inserted in them.*" (Emphasis supplied).

Similarly in *United States* v. *Farrington* (1881), 5 Fed. 343, where the Court was asked to quash certain indictments based upon incompetent testimony, it was said:

> "It is not the province of the Court to sit in review of the investigations of a Grand Jury as upon the review of a trial when error is alleged; but *in extreme cases*, when the Court can see that the finding of a grand jury is based upon such utterly insufficient evidence, or such palpably incompetent evidence, as to indicate that the indictment *resulted from prejudice*, or *was found in willful disregard of the rights of the accused*, the Court should interfere and quash the indictment." (Emphasis supplied)

The District Court below commented that "The defendant and his very earnest counsel, no doubt, are convinced that persecution may have motivated this second indictment," but held that "We are bound to assume the integrity of the judicial process of the United States, of which the grand jury is a part." (R. 32) No one more sincerely than petitioner and his counsel is willing to assume *generally* the "integrity of the judicial process of the United States"; in fact, we rely on the integrity of that process. But we know of no rule of law which makes a presumption of integrity in a *specific* case irrebutable and it was precisely this task of rebuttal which petitioner undertook in this case when he offered to prove through the persons of the Attorney General of the United States, the District Attorney of Dallas County and the Chairman of the Dallas Crime Commission and through newspaper clippings that there exists an abuse of federal process con-

ceived at a political party convention and executed during a political campaign during which Texas was a doubtful state. (R. 151) It is true that this may be a difficult task but petitioner was diligently prepared to present his proof and the Court below erred in refusing to hear him.

The present case is the "extreme case" where the court's inherent duty to prevent persecution and oppression should be exercised. The facts of record, even when examined apart from the offer of proof, emphatically demonstrate both prejudice and willful disregard of the rights of the accused in connection with the issuance of the second indictment.

No other proof of prejudice should be necessary than the remarks of Judge Davidson at the time of the impanelling of the Federal Grand Jury in Dallas on September 16, 1952, which returned the second indictment against petitioner. The Judge said that he might call the jury back "to submit something special to it"; that "either the Court or the Attorney General, or the Court on direction of the Attorney General, may have other matters that should be submitted to you to be gone into at a future time". (R. 153) And then in the next sentence, same context and same paragraph, he said:

> "And, I might say, in this connection, that some time since *you have read in the paper* of a man by the name of Noble being blown to pieces at his mailbox. Not long before that you read where his wife was blown to pieces in his automobile, a bomb was placed under the hood. And not long before that you read where another man was killed; and, another man was killed; and, another man was killed." (R. 153)

This was an unmistakable reference to a series of unsolved killings with which this petitioner's name had been irresponsibly linked by the Texas newspapers. No juror was in doubt about what the Judge meant. But the Judge went on to make his meaning inescapable. He praised county officials in saying:

> "We have one of the most efficient county governments in all of Texas. We have one of the most efficient police forces in all of Texas. *They come here in this courtroom and cooperate with this Court. We will want to cooperate with them.*" (Emphasis supplied) (R. 153)

and then said flatly:

> "But, these hired gangsters, and the men that hire them, often are men, the handlers of money, *they may cover their tracks when it comes to the killings, and yet leave them wide open when it comes to spending their money.*
>
> "On a case of that kind, delving into activities of men of that kind, under the heading of non-payment of income taxes, may reveal and open up an opportunity to punish men, as was done in the case of Al Capone." (R. 154) (Emphasis supplied)

That there was a "willful disregard of the rights of the accused" is disclosed by the extraordinary interest of the Attorney General of the United States in this case out of the thousands handled by his Department. It is unprecedented in the annals of income tax law for a man to be indicted, tried and sentenced for an alleged income violation in one year and then within a month after his sentence find himself indicted again for tax violation in a *prior year*. Obviously nothing could have been discovered between September 3, 1952, when petitioner was sentenced for *1949* income tax violations, and October 3, 1952, when a second indictment was returned against him for alleged tax violations in *1948*, which was not already known to the enforcement arms of the government prior to September 3, 1952.

By his offer of proof at the removal hearing petitioner sought the right to explain the political motivation of these extraordinary events and to prove an actual abuse of federal process to permit a political circus trial in Texas courts, which, if proved, would invalidate the second in-

dictment for prejudice and wilful disregard of his rights. He did not do this "frivolously" but with serious regard for the integrity of our judicial system in the belief that his rights as an American citizen should not be subordinated to political expediency. Refusal to hear his proof, unless reversed by this Court, would make petitioner the victum of political persecution and oppression alien to American concepts of justice and the integrity of the judicial process.

3. The language of Rule 40 of the Federal Rules of Criminal Procedure requiring that a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment, was not intended to create a conclusive presumption of probable cause for removal upon presentation of an indictment, and the courts below erred in so construing the rule. If this language is to be construed as raising such a conclusive presumption then the rule itself is invalid because it violates defendant's constitutional rights under Art. III, Sec. 2, Cl. 3 and the Fifth and Sixth Amendments of the Constitution of the United States.

The adoption of Rule 40 in its present form was preceded by considerable controversy among the rule makers. The nature of this controversy is well illustrated by the contrasting views of District Judge Yankwich, who heard this case below, and the views of District Judge Holtzoff of the United States District Court for the District of Columbia, a prolific writer in the field of Federal rules.

In a book on the new Federal rules published by Judge Yankwich under the title of *The New Federal Rules of Criminal Procedure,* (Parker & Co., Los Angeles) he said:

> "It is quite apparent that, in cases prosecuted by indictment, the new rule deprives the defendant of the right to question the existence of probable cause, a right which is his now."

Judge Yankwich also observed that:

> "While it it is true that the presumption of probable cause is attached to an indictment by a Grand

> Jury, given the fallibility of Grand Juries and the tendency of sometimes returning indictments upon the hearsay testimony of investigating agents, the removal of this safeguard to a person arrested in another district may result in injustice."

On the other hand, Judge Holtzoff, then secretary to the Rules Committee, in an article published in June, 1945, 33 Calif. Law Review 230, 4 F.R.D. 455, seemed to approve the rule as a contribution to the improvement of the administration of justice. Judge Holtzoff endeavored to explain the different treatment accorded to an information as compared with an indictment by reference to the rule that the action of the Grand Jury is not subject to review by the court of which it is an arm, but even so he demonstrated a misconception of the effect of the new rule when he said:

> "The new practice, *while according safeguard to the defendant against possible oppression and improvident action on the part of the prosecuting branch of the government,* at the same time deprives him of a weapon which has been used for delaying and obstructing the expeditious and orderly disposition of criminal cases." (Emphasis supplied)

It is difficult to understand how an indictment may be treated as "conclusive proof of probable cause" without subjecting a defendant to "possible oppression and improvident action on the part of the prosecuting branch of the government." *

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* Still another Federal Judge has joined Judge Yankwich in being sharply critical of the new removal rule. In *U. S.* v. *Hopper,* (1945) 63 F. Supp. 612, Judge McCulloch said:

"All I can say, in reply to the rule makers about their proposed Rule 40, is that they would well have hesitated before making such radical change in the removal practice that has been built up in this country over a period of more than one hundred and fifty years, and which has become settled law, including three or four seasoned decisions in the United States Supreme Court, among them *Tinsley* v. *Treat,* 1907 *supra; United States ex rel. Hughes* v. *Gault,* 1926, 271 U.S. 142, 46 S. Ct. 459, 70 L. Ed. 875; *United*

Although upholding the Rule, Judge Yankwich seemed to invite this appeal when he said:

> "I realize that *this is the first time* to my knowledge *that the constitutionality of this section has been challenged.* I cannot find in the books any case which has resulted in a published opinion, that I know of." (Emphasis supplied) (R. 200)

He reasoned that the right to a removal hearing was statutory and not constitutional and what Congress could confer by statute it could limit, restrict or withdraw by statute. Since the new rules had been adopted by Congressional resolution after their approval and endorsement

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States ex rel. Kassin v. *Mulligan,* 1935, 295 U.S. 396, 55 S. Ct. 781, 79 L. Ed. 1501.

Personally, I don't think there is anything in the problem of dealing with federal crime and federal offenders that requires such a strict rule as proposed; it is not just a routine matter, but means a whole lot to a defendant and to his family to be arrested on a charge brought two thousand miles away, as in this case, and asked to go back to answer something that may not hold up. * * *

"The discretion which, during all the country's history, it has been thought wise to leave in the hands of the judge before whom the removal proceedings are conducted—to inquire into the circumstances, if they seem to call for inquiry—should not be so lightly taken away by a rule. When a man is arrested at one side of the country and charged with an offense on the other side, he ought to have leeway to make some showing about the fact, without being dragged, willy-nilly, across the country, among strange people, crippled financially, there for the first time afforded a chance to do something in the way of defending himself.

"I should have quoted further from the rule makers from page 150 of the Preliminary Draft:

" 'Under the proposed rule, if the prosecution is based upon an indictment, appearance on the face of the indictment of lack of jurisdiction would not constitute an adequate basis for denial by a district judge of an application for a warrant of removal.'

"I admire the frankness of the man who wrote that, but I don't think much of his sense of justice. I commend as required reading to any one interested in this subject the historic 'Political Removal' cases of in re *Dana, Editor of the New York Sun,* 1873, Fed. Cas. No. 3, 554, 7 Ben. 1, discussed in *Cooley on Constitutional Limitations,* 7th ed,. p. 459, note 2, and *United States* v. *Smith,* D.C. 1909, 173 F. 227."

by the Supreme Court, he considered that he was without discretion to question the validity of the indictment.

Petitioner submits that such an interpretation of the rule represents so serious and important a change in the historical treatment of defendants in removal hearings that it is important to the orderly administration of justice that the Supreme Court examine the rule in the light of its own earlier decisions and the constitutional protection which defendants enjoy to be tried in the district where their crimes, if any, were committed.

It should not be presumed that an omnibus approval of new criminal rules was intended by the Supreme Court to endorse a specific method of applying the rule in all cases. As noted by the Advisory Committee on Rules, 18 U.S.C.A., post. Rule 40 (b): "The scope of a removal hearing, the issues to be considered, and other similar matters are governed by judicial decisions." The basic question is whether the United States District Court seeking a removal can legally acquire jurisdiction over the defendant, despite his efforts to object, on the basis of an invalid indictment.

For 150 years the view of the Supreme Court was that in a removal hearing an indictment was merely prima facie evidence of probable cause, *Tinsley* v. *Treat* (1907), 205 U.S. 20, 27 S. Ct. 430, 51 L. ed. 689. It is true that Mr. Justice Holmes in U. S. ex rel. *Hughes* v. *Gault*, 271 U.S. 142, 46 S. Ct. 459, 70 L. ed. 875, brusquely declared that "the constitution does not require any preliminary hearing before a party charged with a crime against the United States is brought into the Court having jurisdiction of the charge," but the *Hughes* case involved no attack on the basic validity of the indictment and it is significant that Justice Brandeis expressed the dissenting opinion that "by refusing to hear and consider evidence introduced or offered which bore upon the existence of probable cause, the Commissioner did not merely commit error, but deprived the Petitioner of his liberty without due process of law in violation of the Fifth Amendment, because he was

denied a fair hearing," citing *Tinsley* v. *Treat, supra.* It is also true that in the later case of *U. S. ex rel. Kassin* v. *Mulligan,* 295 U. S. 396, 55 S. Ct. 781 (1935), Mr. Justice Butler cited the *Hughes* case as authority for the proposition that "there is no constitutional right to be hearing in advance of removal," but Justice Butler continued in his opinion to say, "*In the absence of evidence requiring a finding that there is no ground for prosecution,* the Government is entitled to an order of removal." (Emphasis supplied) This is the equivalent to saying, of course, that if adequate evidence had been offered to show there were no grounds for prosecution, the Government was not entitled to removal.

The view of Judge Yankwich that a removal hearing does not involve constitutional rights is not supported by the decisions of this Court. Judge Yankwich referred to the historical precedent of the removal of Aaron Burr from one district to another district as justification for his belief that constitutional principles are not involved in removal hearings, observing that Burr had been ordered removed in advance of any indictment. However, an examination of the *Aaron Burr* case, *U. S.* v. *Burr,* C.C.D., Va., 1807, F. Cas. No. 14,694 (a), discloses that when Chief Justice Marshall in 1807, sitting as a Committing Magistrate in the District of Virginia, entertained a motion for the commitment of Aaron Burr to another district for trial on a charge of treason, Burr not only demanded an examination, but the Chief Justice actually conducted a hearing and received testimony on the question of probable cause.*

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* There can be no reasonable doubt that this court has considered constitutional principles and protections to be involved in removal hearings. See *Tinsley* v. *Treat, supra,* wherein the court said:

"And it has been repeatedly held that in such cases [removal] the judge exercises something more than a mere ministerial function, involving no judicial discretion. He must look into the indictment to ascertain whether an offense against the United States is charged, find whether there was probable cause, and determine whether the court to which the accused is sought to be removed has

Art. II, Sec. 2, Cl. 3 of the Constitution provides:

> "The trial of all crimes, except in cases of Impeachment, shall be by jury; and such trial shall be held in the State where the said Crimes *shall have been committed;* * * *" (Emphasis supplied)

Amendment Six provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district *wherein the crime shall have been committed.* * * *" (Emphasis supplied)

Neither of these constitutional provisions lays venue merely where a complaint, information or indictment

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jurisdiction of the same. 'The liberty of the citizen and his general right to be tried in a tribunal or forum of his domicile imposes upon the judge the duty of considering and passing upon those questions' Mr. Justice Jackson, the Circuit Judge, re Greene, 52 Fed. 106 * * *

"The Constitution provides that 'the trial of all crimes, except in cases of impeachment, shall be by jury; and that such trial shall be held in the state where the said crimes shall have been committed.' (Art. 3, Sec. 20); and that 'in all Criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed' (Amendment 6); and in order that anyone accused shall not be deprived of this Constitutional right, the judge applied to remove him from his domicile to a district in another state must find that there is probable cause for believing him to have committed the alleged offense, *and* in such other district. * * *

"Appellant was entitled to the judgment of the district judge as to the existence of probable cause on the evidence that might have been adduced. * * * Nor can the exclusion of the evidence offered be treated as mere error, inasmuch as the ruling involved the denial of a right secured by statute under the Constitution."

charges the crime to have been committed. The condition is that venue shall be where "the said crimes shall have been committed." Surely the constitutional provision did not contemplate a perfunctory rubber stamp procedure with the acceptance of an indictment as conclusive proof of probable cause and of jurisdiction by the transfer of a defendant from the district of his residence to another district more than 1,000 miles distant. The rule cannot go beyond the Constitution nor set standards different from those established in the Constitution. This defendant has not received any hearing.

CONCLUSION

The instant case is appropriate for the consideration and decision of these important questions of constitutionality and statutory interpretation. In no other fashion is it possible to obtain Supreme Court action as to the meaning of Rule 40 and its constitutionality. If the removal order is permitted to stand without review by this Court, the processes of appeal will be irrevocably frustrated. If Petitioner is removed to Texas, tried and acquitted, appeals become moot, though he may have suffered tremendous expense and financial loss. If he is removed, tried and convicted, the existence of probable cause for the indictment and jurisdiction in the first place will have merged into the merits of the case and his submission to State prosecution cannot be tested in the Federal case. Rigid and slavish adherence to the letter of the rule, albeit with frequently expressed qualms of district judges, may well cause a denial of due process without remedy.

For the reasons stated, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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February 25, 1953

APPENDIX

Constitution of the United States

Article III, Section 2, Clause 3:

> The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Rule 40. Federal Rules of Criminal Procedure (U.S.C.A. Title 18)

Commitment to Another District; Removal:

* * * * * * * * *

(b) Arrest in Distant District.

* * * * * * * * *

(3) Hearing; warrant of removal or discharge. The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 623

L. B. BINION, ALIAS BENNY BINION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 19–32) and the *per curiam* opinion of the Court of Appeals (R. 241) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 6, 1953 (R. 242), and the petition for rehearing was denied on January 26, 1953 (R. 243–244). The petition for a writ of certiorari was filed on February 25, 1953. The jurisdiction of this Court is invoked under 28

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U. S. C., Section 1254 (1). See also Rules 37 (b) (2) and 45 (a), Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the order of a federal district court in Nevada, directing that petitioner be removed to Texas for trial there on an indictment pending in a federal district court in Texas, is appealable.

2. If so, whether the court below erred in holding petitioner's appeal to be frivolous on the merits.

RULE INVOLVED

FEDERAL RULES OF CRIMINAL PROCEDURE:

RULE 40. COMMITMENT TO ANOTHER DISTRICT; REMOVAL.

* * * * *

(b) *Arrest in Distant District.*

* * * * *

(3) *Hearing; Warrant of Removal or Discharge.* The defendant shall not be called upon to plead. If the defendant waives hearing, the judge shall issue a warrant of removal to the district where the prosecution is pending. If the defendant does not waive hearing, the commissioner or judge shall hear the evidence. If the commissioner hears the evidence he shall report his findings and recommendations to the judge. At the hearing the defendant may cross-examine witnesses

against him and may introduce evidence in his own behalf. If it appears from the commissioner's report or from the evidence adduced before the judge that sufficient ground has been shown for ordering the removal of the defendant, the judge shall issue a warrant of removal to the district where the prosecution is pending. Otherwise he shall discharge the defendant. If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. If a warrant of removal is issued, the defendant shall be admitted to bail for appearance in the district in which the prosecution is pending in accordance with Rule 46. After a defendant is held for removal or is discharged, the papers in the proceeding and any bail taken shall be transmitted to the clerk of the district court in which the prosecution is pending.

* * * * *

STATEMENT

On October 3, 1952, an indictment in two counts was returned against petitioner in the United States District Court for the Northern District of

Texas, charging him with wilful attempted evasion of his own and his wife's income taxes for the year 1948 in violation of Section 145 (b) of the Internal Revenue Code (26 U. S. C., 1946 ed., Section 145 (b)). The indictment alleged that petitioner had filed false and fraudulent income tax returns showing a net loss of $8,744.63 for himself and his wife during the year 1948, whereas he well knew that they actually had a net taxable gain of $67,624.97 and should have paid income taxes of $25,096.20. It was further alleged that these fraudulent returns had been filed with the Collector of Internal Revenue at Dallas, Texas. (R. 6–8.)

On October 9, 1952, the United States Attorney filed an application for a warrant of removal in the United States District Court for the District of Nevada. (R. 3–5.) The application, which was accompanied by a certified copy of the Texas indictment, stated that an arrest warrant had been issued pursuant to the indictment and that petitioner had been arrested under authority thereof within the District of Nevada. The application requested the issuance of a warrant directing the removal of petitioner to the Northern District of Texas for further proceedings under the indictment. (R. 3–6.) After a hearing on November 13 and 14, 1952 (R. 109–180), the warrant of removal was issued on November 15, 1952 (R. 33–34). Petitioner's appeal from this order

(R. 36–37) was dismissed by the Court of Appeals on two grounds: (1) that such an order of removal is not appealable; and (2) that, in any event, the appeal is frivolous on the merits (R. 241–242).

Rule 40 of the Federal Rules of Criminal Procedure defines the procedure governing removal of accused persons to another district. Rule 40 (b) (3) provides, in pertinent part:

> * * * If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged.

At the removal hearing in this case the Government introduced in evidence the certified copy of the Texas indictment (R. 119–120) and showed that petitioner was the person named therein (R. 122–123). This evidence was not disputed.

Petitioner made an offer of proof, however, which he alleged would show that the Texas indictment was politically motivated and was the result of connivance between the Attorney General of the United States and officials of the State of Texas. He offered to show that he

had been a resident of Nevada since 1946 (R. 126); that some four years later he was indicted by the State of Texas for gambling violations but that extradition was refused by the State of Nevada (R. 126–128); that subsequently, as the result of a very rigorous investigation by the Bureau of Internal Revenue and officials of the State of Texas covering the years in which he had filed income tax returns in Dallas, an indictment was returned against him on May 2, 1952, in the United States District Court for the Northern District of Texas charging wilful attempted evasion of income taxes amounting to approximately $14,000 for the year 1949 (R. 128); that upon his agreement to plead *nolo contendere,* and with the consent of both United States Attorneys, the case was transferred to the United States District Court for the District of Nevada under Rule 20 of the Federal Rules of Criminal Procedure (R. 128–129); that the Attorney General of the United States, at the instigation of Texas state officials, endeavored unsuccessfully to have the case retransferred (R. 129–131); that on September 3, 1952, petitioner was fined and placed on probation for five years, despite the Government's request that he be sentenced to prison[1] (R. 131); that on September

[1] Petitioner states (Pet. 5; cf. R. 131) that Government counsel recommended a prison term "solely for the purpose of permitting the Texas State authorities to place a hold order upon him * * *." There is no support for this state-

10, 1952, the Attorney General of the United States and an official of the State of Texas held a conference at which the subject of petitioner's income taxes for the year 1948 was discussed (R. 131–134); that the case was not handled in the normal manner and petitioner's attorneys were not accorded a promised conference in the Department of Justice prior to the presentation of the case to the grand jury (R. 135–136); and that the judge who impaneled the grand jury called their attention to a recent series of gangster killings, with which petitioner's name had been linked, and told them that, as in the case of Al Capone, the income tax laws provided a possible method for punishing such people (R. 152–154). Counsel for petitioner argued that they would be able to prove that the sole purpose of the present indictment was to bring petitioner to Texas for surrender to the state authorities[2] (R. 150, 154, 162–163); that there was no probable cause for belief that petitioner had attempted to evade his income taxes for 1948 (R. 132); and that the

ment in the record. On the contrary, Government counsel stated that it was the general policy to recommend a prison term in criminal tax cases (R. 97–98), and that such a recommendation was made in this case after consideration of petitioner's background and reputation and the amount of the understated income (R. 98).

[2] During the course of the argument Government counsel stated that (R. 163) "not only does the Federal Government feel it has an offense here, but the Federal Government has every intention of prosecuting this man for [violation of] the very statute under which we are seeking his removal."

indictment was a political persecution motivated by the fact that there was a presidential campaign in progress and Texas was a doubtful state (R. 126, 150–152, 154, 162–163, 165).

The District Court refused petitioner's offer of proof, holding that under Rule 40 of the Federal Rules of Criminal Procedure, a certified copy of an indictment conclusively establishes probable cause, and that removal is mandatory upon production of such certified copy and proof that the defendant is the person named in the indictment. (R. 20–32, 180–196.)

ARGUMENT

1. Petitioner concedes, as he must, that "in the ordinary case, without complications, Federal courts have usually held that a removal order is interlocutory in nature and not subject to appeal." (Pet. 10.) Indeed, the cases cited in the petition show that this rule is without exception, and that no federal appellate court has held that an otherwise nonappealable removal order is rendered appealable because of alleged "special circumstances." *Edelstein* v. *United States,* 97 F. 2d 271 (C. A. 3), certiorari denied, 305 U. S. 617; *Wood* v. *Cooper,* 18 F. 2d 535 (C. A. 8), certiorari denied, 274 U. S. 750; *Fries* v. *United States,* 284 Fed. 825 (C. A. 9); *Murray* v. *United States,* 273 Fed. 522 (C. A. 2). Cf. 28 U. S. C. 2253.

Petitioner contends, nevertheless, that the order in this case is appealable because it not only determined that he must return to Texas for trial on the federal indictment, but also irrevocably subjected him to arrest and trial by the State of Texas on a state offense. He argues (Pet. 8, 9, 10–13) that this particular removal order should be treated as falling within that "small class" of orders which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–547.

Petitioner's argument is faulty, both in its assumptions as to the nature and effect of the removal order here involved and in its analysis of the pertinent legal authorities. The only question before the federal district court for Nevada in this proceeding was whether, under Rule 40 (*supra*, p. 2), "sufficient ground has been shown for ordering the removal of the defendant * * *." Where the prosecution is by indictment, as in this case, this is conclusively established by production of a certified copy of the indictment and by proving that the defendent is the person named therein. The district court's order here determined only that petitioner must return to the Northern District of Texas to stand trial on the federal indictment pending there (R. 33–34),

and he is at present at liberty on bond to the federal court on condition that he appear to answer the charge when ordered to do so (R. 34–36). The only issue presented at this stage of the case is whether petitioner should return to the jurisdiction of the federal district court for the Northern District of Texas, where the Government intends to try him under the indictment pending in that court.

The district court's order does not necessarily subject petitioner to the jurisdiction of the Texas state court under the gambling indictment there pending against him. The federal court has already taken jurisdiction over his person, and the state court cannot interfere until that jurisdiction has been exhausted. "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose." *Ponzi* v. *Fessenden,* 258 U. S. 254, 260; cf. *Covell* v. *Heyman,* 111 U. S. 176; *Ableman* v. *Booth,* 21 How. 506. The federal indictment may not be dismissed by the Government without the consent of the district court in Texas. Rule 48 (a), Federal Rules of Criminal Procedure. That court may protect its jurisdiction over the person of petitioner by the issuance of any appropriate writ.

United States v. *Conley,* 80 F. Supp. 700, 701–703 (D. Mass.). And should any substantial question arise as to violation of petitioner's constitutional rights, habeas corpus would, of course, be available in the district where he is detained at the time of such alleged violation. Cf. *United States* v. *Reing,* 191 F. 2d 297, 300 (C. A. 3), certiorari denied 343 U. S. 909. The Attorney General could surrender petitioner to the appropriate state officials of Texas for trial under the state indictment only "if he finds it in the public interest to do so * * *." 18 U. S. C., Section 4085 (a); cf. *Ponzi* v. *Fessenden, supra,* pp. 261–266. Petitioner's apprehensions as to his possible prosecution for the Texas state offense are thus premature, and can furnish no basis upon which to obtain appellate review now of what is essentially an interlocutory, non-appealable order of removal, which is necessary to enable the federal district court in Texas to try him under the indictment pending in that court.

The cases upon which petitioner relies to establish the appealability of this particular removal order cannot bear the weight he places on them. In each, the legal or constitutional right claimed by the appellant had not been raised prematurely, as here, and had been definitively and finally determined by the order from which the appeal was taken. In *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, the appellant's claim was

that the plaintiff in a pending suit should be required to post an indemnity bond, and his motion to require the bond had been denied. In *Stack* v. *Boyle,* 342 U. S. 1, the appellants' motion for reduction of bail pending trial had been denied. In *United States* v. *Cefaratti* (C. A. D. C.), decided November 6, 1952, certiorari denied, No. 534, March 9, 1953, the defendant's motion to suppress vital evidence had been granted, thus destroying the Government's case. In all of these cases the district court's ruling was a final determination of a legal right directly in issue, and asserted at the proper time. In this case, however, the right which petitioner claims is being violated by the removal order is the alleged "right given him by the asylum state of Nevada to resist extradition to Texas for trial on a state indictment." (Pet. 10.) As has been shown, that right, if any, was not in issue before the district court; it was being asserted prematurely, and it was neither directly nor finally determined by the removal order, the only effect of which is to compel petitioner to stand trial in Texas on the federal indictment. If and when petitioner should be deprived of any federal constitutional right, he will be able to assert it at such time and in the district where it occurs. *United States* v. *Reing, supra.*

2. The district court correctly held that, since the Government had produced a certified copy of

the indictment and had proved that petitioner was the person named therein, the order of removal should issue. The court relied upon the language of Rule 40 of the Federal Rules of Criminal Procedure and upon the Advisory Committee's notes to that rule.

In so far as pertinent to the present case,[3] Rule 40 (b) (3) provides:

> * * * if the prosecution is by indictment, a warrant of removal *shall issue* upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment. If the prosecution is by information or complaint, a warrant of removal shall issue upon the production of a certified copy of the information or complaint and upon proof that there is probable cause to believe that the defendant is guilty of the offense charged. * * * [Emphasis supplied.]

This clear provision of the rule that proof of identity and a certified copy of the indictment constitute "sufficient ground" for ordering removal of the defendant is emphasized in the Advisory Committee's notes. The Committee states:

> * * * The practice to be followed in removal hearings will depend on whether

[3] Paragraph (a) of Rule 40 in effect abolishes removal proceedings entirely when the defendant has been arrested in a nearby district. See notes of Advisory Committee on Rules.

> the demand for removal is based upon an indictment or upon an information or complaint. In the latter case, proof of identity and proof of reasonable cause to believe the defendant guilty will have to be adduced in order to justify the issuance of a warrant of removal. In the former case, proof of identity coupled with a certified copy of the indictment will be sufficient, as the indictment will be conclusive proof of probable cause. The distinction is based on the fact that in case of an indictment, the grand jury, which is an arm of the court, has already found probable cause. Since the action of the grand jury is not subject to review by a district judge in the district in which the grand jury sits, it seems illogical to permit such review collaterally in a removal proceeding by a judge in another district.

Petitioner nevertheless argues here (Pet. 8, 9, 13–17) that Rule 40 does not prevent him from going behind the indictment in the removal proceeding to show that it is a nullity.[4] No contention was made in the district court that the indictment failed to state a federal offense, or was a nullity for any reason apparent on its face. All petitioner offered to prove was that the

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[4] This does not seem to have been the contention in the district court. In fact, one of petitioner's counsel admitted that Rule 40 means what the Government says it does (R. 150–151), and the argument principally advanced there was that the rule is unconstitutional in this respect (R. 9–15).

then Attorney General had political motives in directing presentation of the case to the grand jury, that the case was handled in an unusual fashion in the Bureau of Internal Revenue, and that the district judge who impaneled the grand jury gave them a very emphatic charge.

Alleged malice of the prosecutor, as well as alleged departure from "normal procedure" in preparing a case for prosecution (see Pet. 16), are completely irrelevant to the validity of an indictment,[5] so long as it is based upon sufficient evidence properly presented. In any event, the clear language of Rule 40 forbids inquiry into the motives and preliminary investigative procedure underlying the indictment.

Petitioner contends, further (Pet. 8, 9, 17–23), that Rule 40 is unconstitutional if construed as creating a conclusive presumption of probable cause upon the production of an indictment. But he admits that this Court has already decided that there is no constitutional right to any hearing before removal from one federal district to another. In *United States ex rel. Kassin* v. *Mulligan,* 295 U. S. 396, 400, it was held:

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[5] The charge to the grand jury was, in any event, not improper. A district judge may be very emphatic in pointing out public evils so long as he does not interfere with the function of the grand jury to decide whether, and whom, to indict. *United States* v. *Buck*, 18 F. Supp. 213, 221 (W. D. Mo.), affirmed *sub* nom. *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8), certiorari denied, 303 U. S. 644.

> There is no constitutional right to a hearing in advance of removal. Undoubtedly, Congress has power to direct that accused persons be taken, immediately and without hearing, before the court for trial. *Hughes* v. *Gault,* 271 U. S. 142, 149, 152.

The Court went on to point out that Congress had given a statutory right to a hearing to prevent hardship and injustice, and that, under the law as it then stood, the production of an indictment constituted a *prima facie* showing of probable cause requiring removal unless rebutted by convincing evidence that the prosecution was baseless. *United States ex rel. Kassin* v. *Mulligan, supra,* at 400–401. The law at present, as declared in Rule 40, is clear and unambiguous: the indictment is conclusive proof of probable cause.

CONCLUSION

The decision below is correct, there is no conflict of decisions, and no question of substance warranting review by this Court is presented.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1952

No. 623

L. B. BINION, alias BENNY BINION, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Case No. 13,655, in United States Court of Appeals for Ninth Circuit

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner respectfully prays for a rehearing and reversal of the order entered on April 13, 1953, denying his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In support of this petition for rehearing, petitioner urges the following two substantial reasons for issuance of a writ of certiorari, neither of which was presented to this Court in the original petition:

1. This Court should issue a writ of certiorari in this case to decide the basic issue of whether the lower courts

are precluded from questioning the constitutionality of any of the mandatory provisions of the Federal Rules of Criminal Procedure in view of their promulgation by this Court.

2. This Court should issue a writ of certiorari in this case to decide where the alleged crime of income tax fraud is committed when a taxpayer delivers his return to the wrong Collector, and, if the alleged crime is committed where the return was required to be filed, whether such a taxpayer's constitutional rights are violated by removal to a Federal Judicial District which does not have jurisdiction of the alleged crime, where the removal is under color of an invalid Federal indictment procured to circumvent the extradition procedure between States.

REASONS FOR GRANTING THIS PETITION

I.

This Court Should Issue a Writ of Certiorari in This Case to Decide the Basic Issue of Whether the Lower Courts Are Precluded From Questioning the Constitutionality of Any of the Mandatory Provisions of the Federal Rules of Criminal Procedure in View of Their Promulgation by This Court.

Rule 40(b)(3) provides, without exception, that, "If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment". The promulgation of this rule, with no provision for exceptions in any case, amounts essentially to a declaratory judgment or an advisory opinion by this Court that in no case will a defendant's constitutional rights be violated by removal if the formalities of an indictment and an identification of the defendant are observed. It is submitted that, because of

this Court's adoption of this flat interpretation of the Constitution, the lower courts feel powerless to decide that the mandatory provisions of Rule 40(b)(3) are unconstitutional in any situation, regardless of the circumstances. This was, in fact, the position taken by the Ninth Circuit in this proceeding. Notwithstanding that the petitioner's memorandum in opposition of motion to dismiss appeal from the District Court judgment specifically raised the question of the constitutionality of Rule 40(b)(3) [R. 233-238], the Ninth Circuit called the defendant's appeal frivolous because it was made in the face of the mandatory provisions of Rule 40 [R. 241].

This decision by the Ninth Circuit highlights a basic issue implicit in the adoption by this Court of abstract rules of criminal procedure. If this decision is sound, the adoption of such rules necessarily prejudged constitutional issues which had not been presented on their facts and which might not even have been thought of. This issue was raised by Mr. Justice Frankfurter in stating his reasons for not approving the adoption of the Federal Rules of Criminal Procedure:

> "And this leads to another strong reason for not charging this Court with the duty of approving in advance a code of criminal procedure. Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules, however fully considered by members of the lower courts and the bar. I deem it unwise to prejudge, however, unintentionally, questions that may in due course of litigation come before this Court by having this Court lay down rules in the abstract rather than deciding issues coming here with the impact of actuality and duly contested." (Memorandum Opinion on Order of December 26, 1944, Adopting Criminal Rules)

The question of whether the lower courts are entitled to exercise their judgment as to the constitutionality of

the mandatory provisions of Rule 40(b)(3) or of any other mandatory provision of the Federal Rules of Criminal Procedure in the context of the facts and circumstances of the case in which the constitutional issue is raised, or whether they are bound by the predetermination of all such issues by this Court through its adoption of the Federal Rules of Criminal Procedure is an important question of Federal law which has not been, but should be, settled by this Court. See Rule 38(5)(b) of the Supreme Court Rules.

Furthermore, if this Court should make the issuance of writs of certiorari, in cases challenging the constitutionality of provisions of the Rules of Criminal Procedure, dependent on the usual test of conflict between the circuits, it would be virtually impossible for this petitioner or any other petitioner challenging the constitutionality of such provisions to obtain a writ of certiorari because of the natural inclination (if not an actual or assumed legal compulsion) on the circuit courts to support the constitutionality of rules adopted by this Court. Thus it was that this Court granted certiorari on a petition for rehearing in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 83 L.Ed. 34, upon a showing that a conflict of decision was improbable.

In this connection it will be noted that only one lower court has, so far, had the temerity to challenge the constitutionality of a mandatory provision of the Rules of Criminal Procedure adopted by this Court. In *United States* v. *Bink*, 74 F. Supp. 603, the District Court for the District of Oregon refused to accept jurisdiction under Rule 20. Subsequently, however, even this District court has bowed before the force of this Court's adoption of the Rules, stating, in *United States* v. *Tollett et al.*, 76 F. Supp. 871,

> "The Court therefore advises the Clerk to forward certified copies in accordance with the express com-

> mand of the Rule [Rule 20]. Neither this Court nor the Judges nor the Clerk defy this mandate even in view of doubts as to validity."

In this case, petitioner alleges that the mandatory provisions for removal under Rule 40(b)(3) are being deliberately misused to circumvent his constitutional rights under the Fifth Amendment. He alleges that an invalid indictment is being used to force his return to the jurisdiction of the State of Texas, thus depriving him of the due process of extradition. This is a novel situation. So far as counsel for the petitioner has been able to ascertain, there are no reported cases in which an invalid indictment for a federal crime has been used as a device to force the extradition of an individual to another state so that he may be tried in the state courts. It is virtually certain that such a misuse of the federal process was not envisioned at the time the mandatory removal provisions of Rule 40(b)(3) were adopted by this Court.

It is the position of this petitioner that the lower courts should not be precluded from protecting the constitutional rights of an individual in a situation of this type, and it is submitted that a writ of certiorari should issue in this case in order to make it clear that this Court did not intend to prejudge every constitutional issue which might conceivably arise through the mandatory application of the Rules of Criminal Procedure promulgated by it.

II.

This Court Should Issue a Writ of Certiorari in This Case to Decide Where the Alleged Crime of Income Tax Fraud Is Committed When a Taxpayer Delivers His Return to the Wrong Collector, and, If the Alleged Crime Is Committed Where the Return Was Required to Be Filed, Whether Such a Taxpayer's Constitutional Rights Are Violated by Removal to a Federal Judicial District Which Does Not Have Jurisdiction of the Alleged Crime, Where the Removal Is Under Color of an Invalid Federal Indictment Procured to Circumvent the Extradition Procedure Between States.

Section 53(b)(1) of the Internal Revenue Code, relating to the place for filing individual income tax returns, provides as follows:

> "Sec. 53. Time and Place for Filing Returns.
> "(a) • • •
> "(b) To Whom Return Made.—
> "(1) Individuals.—Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland."

Article III, Section 2, clause 3 of the Constitution provides that trial shall be held in the state where the crime was committed. The Sixth Amendment to the Constitution provides that the accused in a criminal prosecution is entitled to trial by a jury of the state and district where the crime was committed.

Failure to file a form is a crime committed where the form should have been filed. *United States* v. *Lombardo*, 241 U.S. 73, 60 L.Ed. 897; *New York C. & H.R.R.* v. *United States*, 166 F. 267.

The words "shall be made" in section 53(b)(1) mean "shall be filed"; to file a paper is to deliver it; and, when the mails are used, filing takes place upon delivery at the office of the official required to receive it. *Wampler* v. *Snyder*, 66 F. (2d) 195. In that case the court said, "The office of the collector, as we have seen, is in the city of Baltimore in the state of Maryland. It is there *and nowhere else* that the return 'shall be made' . . ." (emphasis supplied).

Mere delivery of a false income tax return to a person other than the person with whom it is required to be filed does not change the venue of the crime. In *Bowles* v. *United States*, 73 F. (2d) 772, the defendant was convicted in the Maryland Judicial District for making a false and fradulent return to the Collector in Baltimore. Defendant was a resident of the District of Columbia, which is in the Baltimore Collection District, and actually gave his return to a subordinate Bureau official in the District of Columbia. However, the court said, ". . . the taxpayer is *required* to make his return to the Collector for the district in which is located his legal residence or principal place of business . . . The offense having been committed in the state of Maryland where the Collector's office is located and where the return *should be filed*, it follows that the District Court of the United States for the District of Maryland had jurisdiction of the offense charged." (emphasis supplied).

Similarly, mere delivery of an income tax return to a person other than the person with whom it is required to be filed does not start the running of the period of limitations on assessment. *W. H. Hill Co.* v. *Commissioner*, 64 F. (2d) 506, *cert. den.* 290 U.S. 691, 78 L.Ed. 595, and *O'Bryan Bros., Inc. et al.* v. *Commissioner*, 127 F. (2d) 645, *cert. den.* 317 U.S. 647, 87 L.Ed. 521.

It is the petitioner's contention that section 53(b)(1) of the Internal Revenue Code and the above cases show that delivery of an income tax return to the wrong Collector's office cannot result in the commission of a crime at that Collector's office. On the contrary, if a crime is committed, it is committed at the Collector's office where the return should have been filed. This is an important question of federal law which has not been, but should be, settled by this Court. In this case it is vital to the constitutional right of the petitioner to be tried in the state and the district in which the alleged crime of income tax fraud was committed.

Petitioner in this case has been indicted for filing and causing to be filed false and fraudulent income tax returns with the Collector of Internal Revenue at Dallas, Texas, for the year 1948 for himself and for his wife [R. 6-8]. Petitioner has been a resident of Las Vegas, Nevada since late in 1946 [R. 126]. The Record before this Court is blank with respect to the petitioner's principal place of business, and petitioner's counsel at the removal hearing was denied the right to cross examine the testifying Revenue Agent on any issue other than identification so it was not possible to bring out the fact that petitioner's principal place of business was not in the Dallas, Texas Collection District during 1948 and that petitioner was not even present in that district at any time during 1948 [R. 124]. Since the Record does not establish the location of the principal place of business of the petitioner, then the test of residence under section 53(b)(1) of the Internal Revenue Code must be applied. Accordingly, for the purposes of this proceeding, petitioner and his wife were required to file their income tax returns for 1948 with the Collector of Internal Revenue at Reno, Nevada. Consequently, the alleged crime was committed where the returns should have been filed; the returns should have been filed at Reno,

Nevada; and the alleged crime, if any, was committed at Reno, Nevada and at no other place.

The constitutional guarantees in Article III, Section 2, clause 3 and in the Sixth Amendment to the Constitution were meant to protect an accused from unwarranted removal to an improper place for trial as well as to protect him from actual trial and conviction at an improper place. *Salinger* v. *Loisel,* 265 U.S. 224, 232-233, 68 L. Ed. 989, 997. The jurisdictional issue outlined above must be heard at the removal hearing in a case of this type, where the petitioner alleges that the indictment was obtained for improper motives relating to his removal, if petitioner is to have the benefit of his constitutional rights.

To illustrate, assume that the petitioner and his wife in this case had, in fact, actually delivered their income tax returns for the year 1948 to the Collector of Internal Revenue at Reno, Nevada, and that these returns were properly filed under section 53(b)(1) of the Internal Revenue Code at Reno. Certainly, if these had been the facts, the petitioner would have been entitled to attack in a removal hearing the validity of an indictment in the Judicial District of Northern Texas for income tax fraud for 1948, if the indictment was obtained for the sole purpose of forcing his extradition to Texas. If this be true, this Court should review the legal issue raised by the petitioner's contention in this case that his income tax return and his wife's income tax return for 1948 were required to be filed with the Collector of Internal Revenue at Reno, Nevada, and that the alleged crime, if any, took place at Reno, Nevada, since an affirmative decision on this point would place the petitioner in the same position as in the example given above.

CONCLUSION

For the reasons stated, the petitioner respectfully petitions the Court for reconsideration of his Petition for Writ of Certiorari.

Respectfully submitted,

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April 28, 1953

CERTIFICATE OF COUNSEL

I, Ellsworth C. Alvord, attorney for the petitioner, do hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds for issuance of a writ of certiorari which were not previously presented.

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